IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 179 of 2005
In
COMPANY APPLICATION No. 414 of 2004
In
OFFICIAL LIQUDATOR REPORT No. 106 of 2003
In
COMPANY PETITION No. 263 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PARSHWANATH CEMENT COMPANY PVT LTD. - Applicant(s)

Versus

O.L.OF SARDAR CEMENT PVT.LTD. & 2 - Respondent(s)

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Appearance :
MR RD DAVE for Applicant(s) : 1,
OFFICIAL LIQUIDATOR for Respondent(s) : 1,
MR JR SHAH for Respondent(s) : 2,
MR RA MISHRA for Respondent(s) : 3,
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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 7/09/2005

ORAL JUDGMENT

1.The applicant, namely, Shri Parshwanath Cement Company Ltd., has taken out this Judges Summons requesting this Court to pass an appropriate orders, and/or directions, restraining the opponents, their servants and/or agents from selling and disposing of lands admeasuring 17097 sq. mtrs., originally owned by M/s.Sardar Cement Pvt. Ltd., (in liquidation) said to have been under charge with respondent No.3 Oriental Bank of Commerce, since the entire lands belonged to the Company in liquidation have been sold to the applicant by registered sale deed. The applicant has also prayed for the direction that the entire lands bearing Survey No.255 together with whole Super structure and lands appurtenant thereto, situated on National Highway No.8B, near 66 KV GEB Sub Station, Sapar, Taluka Kotda, District – Rajkot, originally belonged to the Company in liquidation have been sold to the applicant by registered sale deed dated 3.7.2004, executed by the O.L., in favour of the applicant upon receipt of full sale consideration. The applicant has also

prayed for recalling of the directions to proceed with the sale of the remaining assets of the Company contained in para-5 of the order dated 20.4.2005 passed in Company Application No.414/2004, as the lands bearing No.255 and all appurtenant lands upon which the factory premises is situated have been sold to the applicant by executing registered sale deed.

2.An affidavit is filed by Shri Hasmukhbhai Harilal Thosani, the Director of the applicant Company, in support of the Judges Summons. Mr.R.D.Dave learned advocate appearing for the applicant has submitted that pursuant to the order passed by this Court for constitution of sale committee on 26.7.2001, the O.L being a Chairman of the Sale Committee has issued the public advertisement on 2.9.2003 inviting tenders for sale of assets of Company in liquidation, namely, land, building, plant and machineries, etc., and office. The Director of applicant Company, namely, Mr.Hasmukh H.Thosani, made composite offer for the entire factory

premises situated at NH 8B, near 66 KV GEB Sub Station, Sapar, District – Rajkot, as well as for office premises situated at 305, Ajanta Commercial Center, Opp. Bombay Hotel, Gondal, Rajkot and offered Rs.77 lacs with the clear intention that if the said offer is accepted, the offerer intends to form private limited Company for acquiring above assets. He has further submitted that the offer of Mr.Hasmukh H. Thosani, has been accepted by the Sale Committee and recommendation was made by the O.L for confirmation of sale in his favour vide his OLR No.106/2003. He has further submitted that after considering all the relevant materials and documents and having satisfied about the offer made by the applicant, this Court has passed an order on 23.12.2003 accepting the offer of the applicant for Rs.77 lacs and confirmed the sale in favour of Shri Hasmukh H. Thosani in respect of the entire property of the Company in liquidation including the office. Mr.Dave has further submitted that the applicant has paid the entire sale consideration of Rs.77 lacs to the O.L. The applicant was also

allowed to enter into factory premises for cleaning and maintenance purpose of the plant and machineries etc., on 19.1.2004. Thereafter, the applicant was put to possession of the factory premises after having received entire amount of Rs.77 lacs on 22.3.2004. He has further submitted that the sale deed was executed on 3.7.2004 in respect of entire factory premises as well as office premises in favour of the applicant Company. He has, therefore, submitted that the entire factory premises and lands appurtenant thereto situated on Survey No.255 on National Highway No.8B, near 66 KV GEB Sub Station at Sapar, Taluka-Kotda, District – Rajkot, has been sold to applicant Company by registered sale deed by the O.L.

3. Mr.Dave has further submitted that neither advertisement, nor tender form bifurcates the lands upon which the factory premises is situated. On the contrary, the applicant Company has made a composite offer of Rs.77 lacs for all the assets of

the company in liquidation, namely, entire assets, where the factory is situated with appurtenant land as well as for the office premises which was made clear from the applicant's offer letter given to the O.L. He has, therefore, submitted that the applicant's offer has been accepted by the sale committee, O.L., as well as this Court. The assets offered in the advertisement or by way of tender forms do not bifurcate securities of different Banks and the assets are sold as one unit and accordingly sale deed has been executed. He has further submitted that the offerers were made to believe that the entire factory premises with land was offered for sale and accordingly offer was made which was accepted. Mr.Dave has, therefore, submitted that as soon as the applicant came to know about the order passed by this Court on 20.4.2005 in Company Application No.414/2004, the applicant immediately moved this Court as neither the Director of the applicant Company nor the applicant Company was party in the said proceedings. The order was passed regarding

distribution of sale proceeds at the instance of respondent No.2 i.e. Rajkot Nagrik Sahkari Bank Ltd. In the said order respondent No.3 – Oriental Bank of Commerce, appears to have raised contention that their security being land admeasuring 17097 sq.mtrs., has not been sold and hence the Court has directed the O.L to sell remaining assets of the Company in liquidation. Mr.Dave has further submitted that to his knowledge there is no surplus land left out to be sold and the entire lands belonging to the Company in liquidation situated at Survey No.255, where the factory premises is situated, has been sold to the applicant by registered sale deed after the sale confirmation order passed by this Court. He has, therefore, submitted that the order dated 20.4.2005 requires to be clarified and appropriate directions for recalling of the order are required to be issued. He has, therefore, submitted that necessary clarification may be issued to the effect that the entire land and factory premises have been sold to the applicant and hence the alleged remaining land

of 17097 Sq.Mtrs., should not be ordered to be sold once the sale deed has been executed and the entire consideration has been paid by the applicant.

4.The O.L has filed his report on 30.6.2005. He has submitted in his report that the assets of the Company were got valued by Shri Naresh K. Shah, a government approved valuer. The said valuer vide his report dated 29.3.2001 has specified that 10,117 sq.mtrs., of land on Survey No.255/P belongs to the Company on which factory shed is situated. The said valuer has given valuation report for 10,117 sq.mtrs., of land of Survey No.255/P, only and not for 27,214 sq.mtrs., of land of the entire Survey No.255. He has further submitted that the upset price etc., were decided by the sale committee on the basis of the said valuation report and the offers were invited accordingly. He has further submitted that after inspecting the property of the Company one Shri Hasmukh H. Thosani had offered Rs.77 lacs for composite offer i.e plant & machinery, building structure, land and

office except records of the Company. He has further submitted that there was no other independent source of information available to the sale committee at that time that 17,097 sq.mtrs., of open land out side the factory shed also belongs to the Company. He has, therefore, submitted that the sale of the assets of the Company including 10,117 sq.mtrs., of the land was confirmed by this Court vide order dated 23.12.2003 passed in OLR No.106/2003. Therefore, the remaining area of land being 17,097 sq.mtrs., of the Company out side the factory shed was not sold since it was not put to sale and the offers were invited only for 10,117 sq.mtrs., of the land.

5. The O.L has further submitted that at the time of confirmation of sale, the secured creditors also did not point out that there is also an open plot of land admeasuring 17097 sq.mtrs., belonging to the Company, out side the factory premises. He has further submitted that none of the secured creditors though aware, ever pointed out that some

portion of the land is mortgaged to Oriental Bank of Commerce, in the sale committee meeting. It was given to understand that Oriental Bank of Commerce was having charge on the Registered Office of the Company and Rajkot Nagrik Sahkari Bank Ltd., was having charge on factory premises of the Company. It is for the first time this discrepancy was brought to the notice when distribution of the sale proceeds was taken place. He has further submitted that while executing the sale deed on 3.7.2004, the area of land through oversight has been mentioned as 27,214 sq.mtrs., of the entire Survey No.255. He has, therefore, submitted that the applicant could not be entitled to claim the excess area of land i.e. 17097 sq.mtrs., on the basis of sale deed. He has further submitted that there is bonafide mistake in the sale deed in mentioning the area of land and therefore the land which was not put to sale does not get transferred or conveyed in favour of the applicant. He has, therefore, sought permission of this Court to rectify the bonafide mistake and he may be permitted to execute the deed

of correction/ modification for excluding 17,097 sq.mtrs., of land out side the purview of the sale deed executed on 3.7.2004.

6.The O.L has further filed his report on 8.8.2005, wherein he has sought permission of this Court to take possession of remaining area of land being 17097 Sq.Mtrs., situated outside the factory shed of the Company in liquidation, as the same was not put for sale. He has also sought direction to the secured creditors, namely, Rajkot Nagrik Sahakari Bank Ltd., and Oriental Bank of Commerce, Ahmedabad, to place on record Form No.8/12 as well as all other necessary documentary evidence showing that the said land is mortgaged to any one or both these Banks. The O.L has further prayed for the direction to the purchaser, namely, M/s. Parshwanath Cement Company Pvt. Ltd., not to create any hindrance while taking over possession of the land in question by the O.L on the ground that the same has already been conveyed to the purchaser by the O.L vide conveyance deed executed on 30.7.2004.

The O.L has further prayed for the direction to the purchaser to execute a deed of correction / modification for excluding 17098 Sq.Mtrs., of land outside the purview of the sale deed executed on 3.7.2004.

7. Alongwith the said report the O.L has also produced the draft of the Sale Deed executed on 3.7.2004 and certain correspondence exchanged between the O.L and the present applicant. The O.L has also placed on record a copy of the application moved by the Oriental Bank of Commerce being Original Application No.333 of 1999 pending before the Debts Recovery Tribunal for impleading the O.L as party in the said Suit. He has also placed on record a copy of the injunction order passed by the Debts Recovery Tribunal on 7.12.1999 in O.A No.333/1999, restraining the respondent from disposing off and preventing alienation of the mortgaged properties described in para 7(a) of the application. The O.L also placed on record the letter of September, 2001 written by Mr.R.A.Mishra, learned advocate for

Oriental Bank of Commerce addressed to the O.L stating that Oriental Bank of Commerce as a secured creditor has filed an application before the Debt Recovery Tribunal on 11.10.1999 for realisation of their dues on 7.12.1999 the Debt Recovery Tribunal has passed an interim order in terms of para-7(a) of the application. It is further stated in the said letter that in view of the pending proceedings, the Oriental Bank of Commerce did not want to part with their claim over the securities charged with them as secured creditors. It was also stated in the said letter that the said proceedings be postponed and Bank's absence may be excused.

8.After filing of the further report by the O.L., the present applicant has also filed further affidavit on 12.8.2005. Mr.R.D.Dave, learned advocate relying on the said further affidavit has submitted that the aforesaid land admeasuring 17097 Sq.Mtrs., of Survey No.255 of Village:Shapar, Taluka: Kotda, Dist.Rajkot was subsequently purchased by the

Company in liquidation from original owner, namely, Shri Manjibhai Bhikhubhai Ghadiya, by registered sale deed dated 25.3.1996 for an amount of Rs.7 lacs only which came to about Rs.40.49 per Sq.Mtrs. Revenue entries were also made in Panchayat record. He has further submitted that very recently on 12.5.2005 M/s.Hariom Pulse Mills Pvt. Ltd., sold its Plot bearing No.236(part) admeasuring 1770.30 Sq.Mtrs., for Rs.1,70,000/- only. This land is within vicinity of land in question originally belonging to Company in liquidation and now purchased by the petitioner. He has, therefore, submitted that on the basis of this sale instance it is clear that the present market value of the land in the vicinity is less than Rs.100 per Sq.Mtr. He has further submitted that to his knowledge and information, there is not a single sale instance of land for Rs.300 per Sq.Mtr., as valued by the valuer. He has, therefore, submitted that the valuation report which is sought to be relied on by the secured creditors is exorbitant and unreliable. The petitioner has paid Rs.12 lacs

more than the second highest offer received by Sale Committee. He has, therefore, submitted that there is no substance in the submission that the additional land admeasuring 17097 Sq.Mtrs., was not sold to the petitioner. Mr.Dave further submitted that the petitioner after having taken the possession of industrial unit has spent lacs of rupees for renovation and upgradation of the plant, machinery, over and above the expenses of conveyance deed, stamp duty, etc. Mr.Dave further submitted that the Oriental Bank of Commerce who claimed to have given finance to company in liquidation is not secured creditor in respect of immovable property, namely, land in question admeasuring 17097 Sq.Mtrs., as the charge has not been registered in respect of this land with Registrar of Companies. He has, therefore, submitted that the said Bank cannot claim any right as secured creditor before this Court.

9.Mr.R.A.Mishra learned advocate appearing for Oriental Bank of Commerce and Mr.J.R.Shah, learned

advocate appearing for Rajkot Nagrik Sahkari Bank Ltd., have strongly opposed the present application moved by the applicant and submitted that it is nothing but a collusion and connivance of the applicant with the O.L and the property was transferred and Sale Deed was executed without bringing this fact to the notice of the members of the Sale Committee. At no point of time the aforesaid land of 17097 Sq.Mtrs., was brought to the notice of the members of the Sale Committee nor to the notice of this Court and straightway for the first time the said measurement was recorded in the sale deed executed on 3.7.2004. This fact itself shows that but for the connivance and collusion of the O.L and the present applicant the said land could not have been formed part of the Sale deed executed on 3.7.2004. The O.L has simply stated that it was merely a mistake on his part. However, one can easily read something more from the said plea regarding mistake. Both these learned advocates have, therefore, strongly submitted that this is very serious matter and

necessary investigation and inquiry is required to be undertaken and present applicant should be divested with the said land and same should be put to sale by auction.

10.After having heard the learned advocate appearing for the respective parties and the O.L and after having gone through the various orders passed by this Court from time to time and the pleadings of the parties as contended in the application as well O.L. Report and after having gone through the documentary evidence which are produced on record, the Court is of the view that immediately after winding up order passed by this Court on 11.1.2001 in Company Petition No.263/1998 the valuer was appointed and he has given his inventory report on 29.3.2001 and in the said inventory report the valuer has observed that the total land area of plant is 10,117 Sq.Mtrs., (2 Acres and 20 Gunthas) on Survey No.255/P. The valuer has further observed that he could not get any document regarding land and buildings as the Directors were

not present and also the office portion was locked. Valuer came to know after the inquiry in local authority regarding area of land etc. The total land area of factory is 10,117 Sq.Mtrs. The valuer has not referred to any other land in the said inventory report. The said valuer has given his valuation report on 8.11.2001, wherein the land area of factory is mentioned as 2 acres 20 gunthas equal to 10,117 Sq.Mtrs. The valuer has also observed that in this industrial area the land rate varies from Rs.300 to Rs.400/- per Sq.Mtrs. Looking to the shape, size and location of plot he valued the said plot at Rs.300 per Sq.Mtrs. The total area of plot is 10,117 Sq.Mtrs., and hence the value of land was taken at Rs.30,35,100 (300 x 10117 Sq.Mtrs.). Based on the said inventory report and the valuation report, the upset prise was fixed and offers were invited. The O.L has given advertisement on 2.9.2003 for sale of assets. Composite offer was received for Rs.62 lacs from Vikrant Enterprises and the same was revised from Rs.62 lacs to Rs.65 lacs in the Sale Committee

meeting held on 16.9.2003. However, the said offer was rejected by the Sale Committee. Thereafter, Shri Hasmukh Thosani – Director of the Company has made a composite offer of Rs.77 lacs after inspecting the property and the Sale Committee has accepted the same in its meeting held on 19.11.2003. Thus, there is no question of putting the land of 17097 Sq.Mtrs., for sale. At no point of time any one has inquired about this nor any measurement was ever disclosed either before the Sale Committee or before this Court and the Sale was confirmed in favour of the highest bidder, namely, Mr.Hasmukh Thosani, for Rs.77 lacs.

11.As observed earlier, this fact was not disclosed in any previous correspondence exchanged between the O.L as well as purchaser. Even in the draft documents which are forwarded by the purchaser to the O.L and approved by the O.L., the fact regarding this additional land was not disclosed. At this stage, it cannot be believed that the O.L was not aware about this additional land as the O.L

was very much a party in the pending suit before the Debt Recovery Tribunal. The O.L was served with all the documents including the interim orders passed by the Debt Recovery Tribunal. The learned advocate of Oriental Bank of Commerce has made it very clear in the letter of September, 2001 that the Bank has filed the Recovery Application before the Debt Recovery Tribunal and interim order was obtained. He has also made it very clear that the Bank has decided to remain outside the winding up and he has also prayed for postponement of proceedings as well as excuse for absence of the Bank in those proceedings. First of all, by virtue of the order passed by the Debt Recovery Tribunal restraining the opponents from alienating the properties mortgaged to the Bank, the O.L should have inquired about this aspect of the matter before executing the sale deed in favour of the purchaser. The collusion and connivance between the O.L as well as the purchaser is clearly revealed while while looking at the sale deed executed on 3.7.2004. The first two pages of the

Sale Deed were never brought to the notice of any one as they do not form part of draft sale document exchanged between the purchaser and O.L. Since the O.L was a signatory of the said sale deed he should have immediately brought to the notice of all concerned, that the above referred open land 17097 Sq.Mtrs., was never put to sale. The description given in the first page of the sale deed is as under:-

“Factory premises Rev.Survey No.255 of N.H. No.8B Opp.66 KVA Sub Station, Shapar, Tal.Kotda, Dist.Rajkot.

Sq.Mts., with shed land 10117 and open land 17097 Sq.Mts., Total Sq.Mts.27214.

Shed is constructed by Iron channel and asbesttots.”

On page-2 of the Sale Deed the description is as under:-

Up Set Value :-

“Value of Furniture Machinery and Tools Rs.25,00,000/- (Twenty Five Lacs Only).

Value of Land and Shed Rs.48,50,000/- (Fourty Eight

Lacs Fifty Thousand Only). “

12.From the above description it becomes obvious that open land of 17097 Sq.Mtrs., never intended to be sold as it did not form part of inventory report, valuation report, O.L. Report submitted before this Court, seeking confirmation of sale in favour of the purchaser nor in the order passed by this Court confirming the sale in favour of the purchaser. No explanation was given by any one as to why the value of furniture, machinery and tools is taken at Rs.25 lacs, though the valuer has valued the same at Rs.45,14,000/-. Even while taking the value of land and construction at Rs.48,50,000/-, it was very clear in the mind of the O.L as well as the purchaser that the value of land of 10117 Sq.Mtrs., is Rs.30,35,100/- and value of construction is of Rs.16,32,000/- as determined by the valuer. Thus, as against the value of Rs.46,67,100/- taken by the valuer for value of land of 10117 Sq.Mtrs., and value of construction the sale deed indicates the value of land and shed at Rs.48,50,000/-. Thus,

the aforesaid land of 17097 Sq.Mtrs., was never in the picture and it appears to be fraudulently incorporated in the sale deed. The fact regarding purchase of the aforesaid land by the Company in liquidation in 1996 or the present sale instance referred to by Mr.Dave learned advocate appearing for the applicant on which heavy reliance was placed by him has no relevance when the sale transaction was taken place and looking to the documents available on record in the form of inventory report, valuation report, and sale confirmation order passed by this Court.

13.It appears to the Court that the conspiracy between the purchaser and O.L might have been hetched right from the beginning and that is the reason that at no point of time the area of land in question was ever disclosed and for the first time it has found its place in the final sale deed. The Court is not accepting the plea of Mr.Dave that the purchaser has paid the price for the entire assets of the Company in liquidation which interalia,

includes the additional land of 17097 Sq.Mtrs., nor the Court is accepting the plea of the O.L that it was merely a genuine and bonafide mistake on his part. This particular fact might have been within the knowledge of both these parties, namely, purchaser and O.L. However, only with a view to derive some undue advantage the said fact was not disclosed. The Court is, therefore, of the view that this additional land of 17097 Sq.Mtrs., was never sold to the purchaser and the purchaser has no right to retain the said land. The O.L is, therefore, directed to take back the possession of 17097 Sq.Mtrs., of land from the purchaser forthwith and if there is any obstruction in taking over the possession he is hereby permitted to take the help of police department. It is, however, made clear that if the present applicant is ready and willing to pay the price of the additional land of 17097 Sq.Mtrs., at the rate of Rs.300 per Sq.Mtrs., and deposit the said amount with the O.L he may be allowed to continue the possession of the said land with him.

14.Before parting, the Court is constrained to observe that the issues which are raised hereinabove more particularly the role played by the purchaser as well as by the O.L is required to be closely scrutinized and proper investigation is necessitated in the matter. Even if it is assumed that there is no collusion or connivance between the O.L and the purchaser, the O.L is certainly negligent in discharging his duty. This vital fact should not have been escaped from his knowledge despite there being sufficient documentary evidence on record. The Court is, therefore, of the prima facie view that all is not well at the O.L office and several transactions have come to the notice of the Court which certainly raised doubts and suspicions. The court would have ordered to hold separate inquiry in this matter, however, the Court has already directed the Central Government to conduct inquiry of O.L office over the period of last 10 years, while passing order in O.L.R. No. 61 of 2005 on 18.7.2005. This issue can also be

looked into while undertaking such inquiry and no separate order of inquiry is made in this application. The writ of this order, therefore, be sent to the same authority forthwith.

15.With the aforesaid directions and observations this application is accordingly dismissed with cost of Rs.10,000/- and cost be paid to Oriental Bank of Commerce forthwith.

(K.A.PUJ, J.)

16. When the order is pronounced, Mr. R.D. Dave, learned advocate appearing for the applicant has prayed for stay of this order. The request is rejected. Office is directed to place Company Application No. 414 of 2004 for further hearing in the matter.

(K.A.PUJ, J.)

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